

September 2023

About the Victims of Crime Commissioner

The Victims of Crime Commissioner (VOCC) is an independent statutory officer with powers to advocate for the respect, recognition, and inclusion of victims of crime in the justice system.

The VOCC is independent of ministers and government departments.

Under the Victims of Crime Commissioner Act 2015 (Vic) (VOCC Act), the VOCC is empowered to advocate for the respect, recognition and inclusion of victims of crime in the justice system by:

- investigating complaints made by victims about their treatment by justice agencies and victims' services¹
- reporting on the compliance of justice agencies and victims' services with the *Victims' Charter Act 2006* (Vic) (Victims' Charter)²
- conducting inquiries into systemic issues that affect victims of crime³
- representing the concerns of victims to government and providing advice to the Attorney-General, the Minister for Victim Support and government departments and agencies about improvements to the justice system to meet the needs of victims of crime.⁴

Unlike victims of crime commissioner roles in other Australian jurisdictions, the VOCC does not deliver services to victims. The VOCC is an independent regulator that monitors the compliance of justice agencies and victims' services with the Victims' Charter, providing an independent complaints and oversight function.

The VOCC is committed to ensuring that victims of crime are heard and respected by justice agencies and victims' services, and that these agencies and services provide safe, inclusive and trauma-informed responses to all victims of crime.

¹ *Victims of Crime Commissioner Act 2015* (Vic) s25A.

² *Victims of Crime Commissioner Act 2015* (Vic) s28(1A).

³ *Victims of Crime Commissioner Act 2015* (Vic) s13(1)(b-c), 23(1).

⁴ *Victims of Crime Commissioner Act 2015* (Vic) s13(1)(a),(d).

This submission

The Department of Justice and Community Safety (DJCS) is undertaking a statutory review of the *Spent Convictions Act 2021* (Vic) (the Act).⁵

This submission addresses:

- the nature and scope of the review
- the need to balance scheme objectives with the impact on victims
- victim notification
- consideration of victim impact
- serious offences under the scheme
- transparency and accountability.

Nature and scope of the review

The VOCC considers the review to be an important opportunity for the Victorian Government to comprehensively assess the operation of the Act and the spent convictions scheme more broadly.

The spent conviction scheme has operated in Victoria for a limited time. Little is known about the scheme's impacts on victims of crime. This is partly because the scheme has not been designed in close consultation with victims of crime or lived experience consultants. It is also because, as discussed further below, there are no formalised mechanisms for victims to participate in the scheme.

For this reason, it is difficult to fully gauge the impacts of the scheme for victims of crime however, media reports in 2023 highlighted community concern about victims being left out of the spent convictions process and the lack of transparency in scheme processes.⁶

The VOCC welcomes a review of the Act but is concerned that this review is not being undertaken independently and the review timeframe is unlikely to enable proper consultation with victims of crime, nor consideration of the full range of factors relevant to victims and their experience of the Act.

⁵ Section 25 of the Act requires a review of the Act after one year of operation: *Spent Convictions Act 2021* (Vic).

⁶ Ashley Argoon, 'Crims Win in 'Secret Deals'', *Herald Sun* (online, 4 August 2023).

To engage meaningfully with victims and those with lived experience, the VOCC advocates for the review to include comprehensive and targeted consultation with victims and stakeholders in relation to:

- the practicalities of a victim notification scheme, including:
 - whether there should be a statutory right for victims to be notified about a spent conviction application / hearing
 - whether the Victims Register should be expanded to include information and notifications relevant to the spent conviction scheme
- mechanisms to increase victim participation, including:
 - a statutory right to provide an updated Victim Impact Statement
 - whether the Victims' Charter should be updated to incorporate entitlements relating to participation in a spent convictions scheme
 - whether Victoria Police, or other Government agencies, have a practical role to play in facilitating victim input
- the extent to which victim impact has been incorporated into judicial decision making to date, noting the above limitations with respect to victim notification and participation.

Balancing the objectives of the scheme with the impact on victims

The Act establishes a scheme for certain convictions to become spent

- immediately
- automatically after a conviction period expires; or
- by making an application to the court.

A conviction that is spent does not form part of a person's criminal record. A person is not required to disclose to another person the existence of a spent conviction, or information in relation to it.⁷

⁷ Magistrates' Court of Victoria, 'Spent Convictions Scheme' (Website, 18 August 2022) <<https://www.mcv.vic.gov.au/criminal-matters/spent-convictions-scheme>>

The scheme aims to reduce the barriers that convictions pose to opportunities such as employment, training and housing.⁸

The VOCC recognises the importance of breaking cycles of crime and disadvantage.⁹ Reducing barriers to gaining employment, training opportunities and housing are crucial to offenders' rehabilitation and ultimately, reducing crime victimisation.¹⁰

However, various inquiries over past decades have acknowledged the need to consider the impact on victims when establishing a spent convictions scheme. In 1987, when considering the implementation of a federal spent convictions scheme, the Australian Law Reform Commission (ALRC) recognised that the public interest must also be considered, including the interests of victims.¹¹ The ALRC noted that for many victims, 'the legal system already seems unduly solicitous of the needs and interests of those guilty of crime.'¹²

In 2019 the importance of victims' interests in a spent conviction scheme was also highlighted by the Legislative and Social Issues Committee's *Inquiry into a legislated spent convictions scheme*. The Committee's Terms of Reference for the inquiry included that:

the Committee should be guided by the public interest in ensuring that the disclosure of criminal history records in Victoria operates in a fair and transparent manner and balances the interests of offender rehabilitation and reintegration with community safety, including the safety of vulnerable Victorians and the safety and wellbeing of victims.¹³

When introducing the Bill to Parliament, the then-Attorney-General reiterated:

the need for the spent convictions scheme to balance the need for rehabilitation of offenders with the inherent risk to the community posed by serious sexual offences and serious violent offences, and an acknowledgement of the severe and lasting harm caused to victims of these offences.¹⁴

⁸ Victoria, *Parliamentary Debates*, Legislative Assembly, 28 October 2020 (Jill Hennessy, Attorney-General).

⁹ The Law Reform Commission, *Spent Convictions* (Report No 37, 1987) 4.

¹⁰ Legislative Council Legal and Social Issues Committee, Parliament of Victoria, *Inquiry into a legislated spent convictions scheme – A Controlled Disclosure of Criminal Record Information framework for Victoria* (2019) ix.

¹¹ The Law Reform Commission, *Spent Convictions* (Report No 37, 1987) 4.

¹² The Law Reform Commission, *Spent Convictions* (Report No 37, 1987) 4.

¹³ Legislative Council Legal and Social Issues Committee, Parliament of Victoria, *Inquiry into a legislated spent convictions scheme – A Controlled Disclosure of Criminal Record Information framework for Victoria* (2019) viii.

¹⁴ Victoria, *Parliamentary Debates*, Legislative Assembly, 28 October 2020 (Jill Hennessy, Attorney-General).

The VOCC supports a legislated spent convictions scheme that balances rehabilitation and reintegration into the community with the objectives of the Victims' Charter, including recognising the:

- impact of crime on victims
- ways the criminal justice system can cause secondary victimisation for victim
- inherent interests that victims have in the criminal justice system
- the victim's role as a participant in criminal proceedings.

It is vital that at each step of the criminal justice system victims are informed, consulted and have a mechanism for their voice to be heard.

The VOCC submits that more can be done to increase victim participation in the spent convictions scheme through:

- a victim notification scheme
- formalised consideration of victim impact during decision making, with increased participatory opportunities for victims.

Victim notification

Under the spent convictions scheme, some people who have been convicted of a 'serious offence'¹⁵ can make an application to the Magistrates' Court for a spent conviction order.

There was no victim notification scheme established under the Act to enable victims to be aware of such applications. The Act does not require the court (or any other Government entity) to notify victims or seek their views when an application is made.

The Act requires that an application for a spent conviction order must be served on the Attorney-General and Chief Commissioner of Police¹⁶ and that they may make a submission on the application.¹⁷ It is possible that it was envisaged that the Attorney-General or Victoria Police may engage with victims at this time, although this is not provided for in the Act and it is not clear whether this has ever happened in practice.

¹⁵ A person may apply for a spent conviction order in relation to a serious conviction if the person was under 21 years when convicted, if no term of imprisonment was imposed or, for offences that are not serious violence offences or sexual offences, the term of imprisonment was not more than five years.

¹⁶ *Spent Conviction Act 2021* (Vic) s 13

¹⁷ *Spent Conviction Act 2021* (Vic) s 14

Under the Act, the Magistrates' Court may determine an application with or without a hearing. If the Attorney-General and Chief Commissioner of Police have indicated their intention to make a submission, then the matter must proceed to a hearing.¹⁸ A hearing will be closed to the public unless the court considers that the circumstances of the case justify the hearing being open to the public.¹⁹ If a hearing is closed to the public the Court can provide directions on which persons may be present at the hearing (in addition to the applicant, Attorney-General and Chief Commissioner of Police).²⁰

There is no requirement to notify victims of the hearing.

While there is no requirement to notify victims of a hearing, the second reading speech introducing the Bill stated that 'the court has discretion to invite a victim to attend the hearing and must take into account any views expressed by victims.'²¹ It is not clear whether this has ever occurred.

In acknowledgement of the long-lasting effect that offending has on victims, the VOCC advocates that the scheme develops a mechanism to facilitate notifications to victims in relation to spent conviction applications for victims who have registered to be notified.

The VOCC recognises there are practical barriers to notifying victims when an offender applies for a conviction to be spent. The timeframes involved in the court application process mean that a person may be applying for a spent conviction many years after they were convicted. Victoria Police records do not generally maintain current contact information for victims once a matter is finalised.

However, the VOCC suggests consideration should be given to whether the Victims Register could be extended (through legislative amendment) so that eligible victims who have consented could be notified of a spent conviction order if this was their wish.

Closed hearings

Presently under the Act, the default position is to close the court during an application for a spent conviction hearing. This approach excludes victims, and other interested parties, from participating in the process.

¹⁸ The Attorney-General has intervened four times to notify the court of technical matters relating to an offender's eligibility: Ashley Argoon, 'Crims Win in 'Secret Deals'', *The Age* (online, 4 August 2023)

¹⁹ *Spent Conviction Act 2021* (Vic) s 16(2)

²⁰ *Spent Conviction Act 2021* (Vic) s 16(4)

²¹ Victoria, *Parliamentary Debates*, Legislative Assembly, 28 October 2020 (Jill Hennessy, Attorney-General).

The VOCC recognises the government's intention that closed hearings reflect the highly sensitive and personal nature of the information disclosed in a spent conviction application. However, during debate on the *Spent Conviction Bill 2020* (Vic), the Honourable Maree Edwards indicated that during the spent conviction scheme process the 'voices of victims can be heard' and victims 'will also have the right to be heard in closed hearings.'²²

The Act should be amended to remove the presumption of a closed hearing. Victims should be encouraged to attend a spent conviction hearing if they choose to do so.

Victims Register

The Victims Register enables some victims to be placed on a register and receive certain information about a prisoner. The Victims Register is governed by the *Corrections Act 1986* (Vic) which provides that some victims may be entitled to certain details about a prisoner, including their release date.²³

The VOCC submits that victims' interests do not just extend to being notified when an offender is being released from prison. Victims have other interests and safety concerns, including in relation to spent convictions.

The VOCC notes that while the Victims Register was not established for the purpose of spent convictions, its purpose, function and scope could be legislatively amended to provide for a broader range of victim notifications, such as in relation to spent convictions.

A trauma-informed victim notification scheme would give victims the choice about whether they wish to be notified and participate in a relevant justice process.

Consideration of victim impact

Whether or not a formal notification scheme for victims is established, the VOCC advocates for greater consideration and participation of victims when a spent convictions application is made.

While the Magistrates' Court must consider a range of (mandatory) factors²⁴ in determining whether to make an order for a spent conviction, including

²² Victoria, *Parliamentary Debates*, Legislative Assembly, 19 February 2021 (Maree Edwards).

²³ *Corrections Act 1986* (Vic) s 30A(2).

²⁴ A range of mandatory factors are outlined in section 19(2) of the Spent Convictions Act.

the impact on the victim,²⁵ there is no formal mechanism for victim impact to be presented to the court.

Furthermore, the Act does not provide legislative guidance on how the Magistrates' Court considers victim impact in practice.

Unlike sentencing or parole hearings, where victims have a legislated right to provide a Victim Impact Statement (VIS)²⁶ or a written submission,²⁷ the Act does not outline how the views of victims will be sought before determining a spent conviction order.

This limits the extent to which victims may be provided the opportunity to submit their views on a spent conviction application or provide an updated VIS.

While a VIS from the time of sentencing may be available to the court, up to ten years may have elapsed since an offender's conviction expired. The VIS tendered at the time of the sentence (if at all) may no longer be entirely relevant or accurate at the time of the spent conviction order application.

In acknowledgement of the long-lasting effect that offending has on victims, the VOCC advocates for:

- victims to be given the opportunity to provide an updated Victim Impact Statement (current at the time of the spent conviction application) addressing current information on their recovery and potential ongoing safety fears
- victims to have the right to attend a hearing, whether it is a closed or open hearing
- hearings to be adjourned, where relevant, to ensure that victim impact is sought if there is insufficient (updated) victim impact information available for the court to make a decision.

Where victims are to have input, it is vital they are supported, similar to the role the Victims Register plays in supporting victims who wish to participate in parole decisions. The VOCC has long advocated for a comprehensive Victims Legal Service. This is another legal process where victims may wish to be supported to participate with trauma-informed legal advice and assistance.

²⁵ *Spent Conviction Act 2021* (Vic) s 19(2)(b)

²⁶ *Sentencing Act 1991* (Vic) s 8K.

²⁷ Adult Parole Board, *Victims of Crime – make a submission and have your say* (Web page) <www.adultparoleboard.vic.gov.au/victims-crime/victims-crime-make-submission-and-have-your-say>

In summary, the Act should be amended to:

- provide for a victim notification scheme
- provide victims with an opportunity to provide an updated Victim Impact Statement
- provide victims with an entitlement to attend hearings
- ensure hearings are adjourned where there is insufficient victim impact available for the court to make an informed decision.

The VOCC also advocates for the Magistrates' Court to develop a Practice Direction to provide clarity and certainty for victims and their support workers around the processes for victim notification and participation.

The Victims' Charter should also be amended to ensure any new rights and entitlements are reflected.

Serious offences under the scheme

The VOCC expressed concerns about the inclusion of serious violence and sexual offences in the spent convictions scheme when the Act first commenced in 2021. The VOCC continues to maintain these concerns.

The second reading speech refers to people with 'minor historical offending'. However, the VOCC notes that in some circumstances, a range of serious offences can be spent.

Definition of 'serious violence offence'

Under the Act, if an offence is a 'serious violence offence' or a 'serious conviction' it can only be spent by application to the Magistrates' Court.²⁸

The definition of 'serious violence offence' in the Act relies on the definition provided in the *Serious Offenders Act 2018 (Vic)*. For the purposes of the *Serious Offenders Act*, serious violence offences include, murder, manslaughter, causing serious injury intentionally and kidnapping.²⁹

A 'serious conviction' means:

- a conviction with 30 months (or more) imprisonment or detention
- a sexual offence

²⁸ *Spent Conviction Act 2021 (Vic)* s 8 with limited exceptions for offenders under the age of 15 years.

²⁹ The full list of serious violence offences are contained in the *Serious Offenders Act 2018 (Vic)* Schedule 2.

- a serious violence offence.³⁰

The Act requires a 'serious violence' offence or 'serious conviction' to be spent by application to the Magistrates' Court.

For this reason, it is important that the definition of 'serious violence offence' continues to capture a wide range of offences that can only be spent by application to the Court.

Spending a conviction by application to the Magistrates' Court recognises the need for the spent convictions scheme to balance the rehabilitation of offenders with the inherent risk to the community posed by serious sexual offenders and serious violent offenders. Further, this acknowledges the severe and lasting harm caused to victims of these offences, as intended.³¹

Serious convictions - spent immediately

The Act provides that in certain circumstances a 'serious conviction' may be eligible to be spent with immediate effect.³² These circumstances include where the serious conviction is for an offence committed when the person was under the age of 15 years.³³

The review provides a further opportunity to examine the appropriateness of all convictions (including a serious conviction) being spent with immediate effect, when the offender is under 15 years of age.³⁴ Serious convictions include sexual violence offences or serious violence offences, including murder.³⁵

When an offence is immediately spent, victims are not afforded the opportunity to provide a statement or submission to the court about the impact on them. This situation applies to serious convictions, which have a lasting impact on victims, even after time has elapsed since the offender was sentenced.

The VOCC advocates for the re-classification of all convictions (including serious convictions) for offenders under 15 years of age to being 'spent on application.' This would provide the court with the opportunity to determine the application for a spent conviction order.³⁶ In determining whether to

³⁰ *Spent Conviction Act 2021* (Vic) s 3

³¹ Victoria, *Parliamentary Debates*, Legislative Assembly, 28 October 2020 (Jill Hennessy, Attorney-General).

³² *Spent Conviction Act 2021* (Vic) s 7

³³ *Spent Conviction Act 2021* (Vic) s 7(1)(c)

³⁴ *Spent Conviction Act 2021* (Vic) s 7(1)(c)

³⁵ *Serious Offenders Act 2018* (Vic) Schedule 2

³⁶ The order may be determined by a Magistrate with or without a hearing: *Spent Conviction Act 2021* (Vic) ss 15, 16.

make an order for a spent conviction, the Court must consider ‘the impact on any victim of the offence to which the application relates’.³⁷ This legislative requirement provides victims with the opportunity to provide the Court with information about the impact of the offence at the time the offender is seeking to have the conviction spent.

Young offenders and spent conviction by application

The review should also consider the appropriateness of serious convictions committed by ‘young offenders’ being spent by application to the Magistrates’ Court.³⁸ The Act defines a ‘young offender’ as a person convicted of an offence and under 21 years of age at the time of sentencing.

The VOCC advocates that due to the severity of these offences (and the fact these offenders are considered ‘adult’ for other purposes, such as voting), consideration should be given to prohibiting certain serious convictions from being spent (for example rape and murder), or to lowering the age of eligibility for ‘young offenders’.

Given the seriousness of these offences, the fact that such convictions can be spent after application may be of concern to victims, notwithstanding the relative youth of the offender. It may also be argued that while still considered ‘young offenders’ in the context of the criminal justice system, some members of the community and victims of crime may consider any offenders over the age of 18 years as ‘adult’.

Transparency and accountability

In the interests of transparency and accountability, victims and the general public may wish to be informed about the number of spent conviction applications made and approved.

The VOCC advocates for the Magistrates’ Court to collect and publish data on spent conviction applications and orders in its annual report.³⁹

Where possible, data on victim participation (e.g. attending hearings or making submissions) should also be published.

³⁷ *Spent Conviction Act 2021* (Vic) s 19(2)(b)

³⁸ *Spent Conviction Act 2021* (Vic) s 11(1)(a)

³⁹ The Magistrates’ Court’s Annual Report for 2021-22 does not provide data on the number of applications for a spent conviction order, despite providing information on other types of applications under the Criminal Division: Magistrates’ Court of Victoria, *Annual Report 2021-2022* (Report) 41
<https://www.mcv.vic.gov.au/sites/default/files/2023-02/MCV%20annual%20report%2021-22_0.pdf>

If hearings remain closed to victims, and other interested parties, this important information is harder to obtain. In the interests of open justice, hearings for spent convictions should be open to victims.